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SERVICE DATE - APRIL 30, 1997

SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41482

FRIGIDAIRE COMPANY, F/K/A WCI MAJOR APPLIANCES--
PETITION FOR DECLARATORY ORDER--CERTAIN
RATES AND PRACTICES OF JONES TRUCK LINES, INC.

Decided: April 24, 1997

We find that the collection of the undercharges in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Because of our finding under section 2(e) of the NRA, we will not reach the other issues raised in the proceeding.

BACKGROUND

This matter arises out of a court action in the United States District Court for the Western District of Arkansas, Fayetteville Division, in *Jones Truck Lines, Inc. v. Frigidaire Company, f/k/a WCI Major Appliances*, Civil No. 94-5059. The court proceeding was instituted by Jones Truck Lines, Inc. (Jones or respondent), a former motor common and contract carrier, to collect undercharges from Frigidaire Company f/k/a WCI Major Appliances (Frigidaire or petitioner). Jones seeks undercharges of $17,076.51 (plus interest and costs) allegedly due, in addition to amounts previously paid, for the transportation 155 shipments of household appliances and parts for such appliances between July 26, 1988, and November 7, 1989.[2] All of the shipments were less-than-truckload movements transported from a warehouse facility used by petitioner in Carrollton, TX, to points in eight states. By order dated September 19, 1994, the court dismissed the proceedings and directed petitioner to submit issues of contract carriage, unreasonable practice, and rate resonableness to the ICC for resolution.

Pursuant to the court order, petitioner, on October 19, 1994, filed a petition for declaratory order requesting the ICC to resolve issues of tariff applicability, contract carriage, rate reasonableness, and unreasonable practice. By decision served October 31, 1994, the ICC established a procedural schedule. Petitioner filed its opening statement on February 2, 1995. Respondent filed its reply statement on February 28, 1995.

Frigidaire, in its opening statement, asserts that respondent's attempt to collect undercharges constitutes an unreasonable practice under section 2(e) of the NRA. Petitioner further asserts that the rates respondent is attempting to assess are unreasonable.

Frigidare supports its argument with an affidavit from Michael Bange of Champion

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] In the court action, Jones claimed undercharges of $17,383.43 based on 156 balance due or corrected freight bill notices. A re-audit of the freight bills resulted in the cancellation of one freight bill and a reduction in the amount of claimed undercharges to $17,076.51.

Transportation Services, Inc., a transportation consultant retained by petitioner. Mr. Bange's affidavit includes among its attachments a representative sample of the "balance due" bills issued by respondent that reflect originally issued freight bill data as well as the "corrected" balance due amounts (Appendix A). Mr. Bange states that nearly all of the original freight bills for the subject shipments indicate the application of a 40 % discount off class rates, subject to a minimum charge floor of $35.00 or $42.00. From his examination of the complaint filed by respondent in the court proceeding, the responses provided by Jones to petitioner's discovery requests, and the "balance due" bills, Mr. Bange maintains that petitioner was offered a freight rate that was not properly or timely filed in a tariff; that petitioner tendered freight in reliance upon the offered rate; and that petitioner was originally billed and paid the offered rate. Mr. Bange is of the opinion that these circumstances provide the basis for a finding of unreasonable practice.

Jones, in its reply statement, acknowledges that, in most cases, it billed and petitioner paid the applicable class rates less a 40% discount or a minimum rate of $35.00 or $42.00. It asserts, however, that the discounts and/or rates initially assessed were not authorized by an applicable filed tariff at the time the shipments were transported. Respondent maintains that the corrected freight bills reflect the appropriate charge for the services rendered and that the newly assessed undiscounted rates have not been shown to be unreasonable. With respect to petitioner's claim that section 2(e) of the NRA governs this matter, respondent contests the applicability of that provision on both statutory and constitutional grounds.[3]

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between

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[3] Jones argues that section 2(e) of the NRA is inapplicable to bankrupt carriers, may not be applied retroactively, and is unconstitutional. We point out that six federal circuit courts of appeals and virtually every other federal court that has considered respondent's applicability arguments have determined that the remedies provided in section 2 of the NRA apply to the undercharge claims of bankrupt carriers such as Jones. *See Whitaker v. Power Brake Supply, Inc.*, 68 F.3d 1304 (11th Cir. 1995) (*Power Brake*); *Jones Truck Lines, Inc. v. Whittier Wood Products, Inc.*, 57 F.3d 642 (8th Cir. 1995) (*Whittier Wood*); *In the Matter of Lifshultz Fast Freight Corporation*, 63 F.3d 621 (7th Cir, 1995); *In re Transcon Lines*, 58 F.3d 1432 (9th Cir. 1995) *cert. denied*, 116 S. Ct. 1016 (1996); *In re Bulldog Trucking, Inc.*, 66 F.3d 1390 (4th Cir. 1995); Hargrave v. United *Wire Hanger Corp.*, 73 F.3d 36 (3d Cir. 1996); *see also, e.g., Jones Truck Lines, Inc. v. AFCO Steel, Inc.*, 849 F. Supp. 1296 (E.D. Ark. 1994).

Further, as the courts have also held consistently, section 2(e), by its own terms and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. *See, e.g.*, Jones Truck Lines, *Inc. v. Scott Fetzer Co.*, 860 F. Supp. 1370, 1375-76 (E.D. Ark. 1994); *North Penn Transfer, Inc. v. Stationers Distributing Co.*, 174 B.R. 263 (N.D. Ill. 1994); *Gold v. A.J. Hollander Co.* (In re Maislin Indus.), 176 B.R. 436 (Bankr. E.D. Mich. 1995); *cf. Jones Truck Lines, Inc. v. Phoenix Products Co.*, 860 F. Supp. 1360 (W.D. Wisc. 1994).

Lastly, in response to respondent's "takings" challenge, the Eighth Circuit in *Whittier Wood* and the Eleventh Circuit in *Power Brake* have concluded that the NRA does not work an unconstitutional taking under the Fifth Amendment. 57 F.3d at 649-52; 68 F.3d at 1306 n.3. We point out that the courts have consistently rejected that argument, as well as respondent's "separation of powers" argument and its other constitutional challenges to the NRA. *See, e.g., Gold v. A.J. Hollander, supra; American Freight System, Inc. v. ICC* (In re American Freight System, Inc.), 179 B.R. 952 (Bankr. D. Kan. 1995); *Rushton v. Saratoga Forest Products, Inc.* (In re Americana Expressways), 177 B.R. 960 (D. Utah 1995), rev'g 172 B.R. 99 (Bankr. D. Utah 1994); *Zimmerman v. Filler King Co.* (In re KMC Transport), 179 B.R. 226 (Bankr. D. Idaho 1995); *Lewis v. Squareshooter Candy Co.* (In re Edson Express), 176 B.R. 54 (D. Kan. 1994).

the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[4]

It is undisputed that Jones no longer transports property.[5] Accordingly, we may proceed to determine whether Jones' attempt to collect undercharges (the difference between the applicable filed tariff rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed on by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, petitioner has submitted representative balance due bills indicating the consistent application of a discount and/or minimum charge in the freight bills originally issued by respondent which reflect the existence of a negotiated rate. We find this evidence sufficient to satisfy the written evidence requirement. *E.A. Miller, Inc.--Rates and Practices of Best,* 10 I.C.C.2d 235 (1994) (*E.A. Miller*).[6] *See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp.*, C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rates and that the

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[4] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

[5] Board records confirm that Jones' motor carrier operating rights were revoked on February 18, 1992.

[6] Jones, at p. 11 of its reply statement, argues that freight bills do not constitute written evidence. Respondent contends that under section 2(e)(2)(D) of the NRA, the Board must consider whether the negotiated rate "was billed and collected by the carrier" in making its merits determination as to whether a carrier's conduct was an "unreasonable practice." This section, according to Jones, contemplates that freight bills reflecting the negotiated rate were issued by the carrier, and the Board must examine these freight bills to determine if section 2(e) has been satisfied. Jones asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision superfluous because the Board, under section 2(e)(2)(D), must independently consider the collected freight bill.

The ICC and the Board have consistently rejected this argument. Section 2(e)(2)(D) requires the Board to consider "whether the [unfiled] rate was billed and collected by the carrier." There is no requirement under this provision or the NRA's legislative history that the Board use a carrier's freight bills for that determination. A carrier may separately attest, or submit or concede in pleading, that the negotiated, unfiled rate was billed and collected, and there is nothing to preclude the Board from using such statements (or other evidence) in finding that section 2(e)(2)(D) was satisfied.

Even if the Board uses freight bills to satisfy this element, however, it is not inappropriate for it to use those same bills to satisfy the "written evidence" requirement of section 2(e)(6)(B). The carrier's argument might be more persuasive if the written evidence requirement were a "sixth" element of the merits determination under section 2(e)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold definitional requirement needed to invoke section 2(e). *See E.A. Miller, supra,* at 239-40. Once that requirement is satisfied by freight bills (or other contemporaneous written evidence), there is nothing to suggest that the same evidence could not be used as part of the Board's separate five-part analysis under section 2(e)(2) to determine whether the carrier's undercharge collection is an unreasonable practice.

rates were agreed upon by the parties).

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance on the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, respondent concedes (respondent's statement at 8-9) that if section 2(e) is read to apply to this case, it will preclude the Trustee from collecting on his claims. We agree. The evidence establishes that a negotiated rate was offered by Jones to Frigidaire; that Frigidaire tendered freight to Jones in reliance on the negotiated rate; that the negotiated rate was billed and collected by Jones; and that Jones now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Jones to attempt to collect undercharges from Frigidaire for transporting the shipments at issue in this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on April 30, 1997.

3. A copy of this decision will be mailed to:

The Honorable H. Franklin Waters
United States District Court for the
Western District of Arkansas,
Fayetteville Division
P.O. Box 1908
Fayetteville, AR 72702-1908

Re: Case No. 94-5059

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary